Supreme Court, U.S.
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92-335

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

RICHARD COLE LEIGHTON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

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QUESTIONS PRESENTED

1. Does this Court's decision and opinion in Grady v. Corbin, (495 U.S. 508 [1990]), represent an abandonment of the principles announced in Blockburger v. United States, (284 U.S. 299 [1932]), relating to multiple prosecutions each based in part on the same act?

2. Where a party by a single act commits two offenses, "A" and"B", and each of such offenses requires proof of a fact which the other does not and neither offense is included in the other, does a conviction for "A" bar a prosecution for "B", where the indictment for "B" does not allege the commission of "A"?

THE PARTIES

In the Circuit Court of Cherokee County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Richard Cole Leighton, who is Respondent herein, as Defendant, Appellee, and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellant, and Petitioner, respectively.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Cherokee County, Alabama, granting the Respondent's motion to dismiss on double jeopardy grounds is not reported and is

submitted as Appendix "A" to this petition.

The order of the Court of Criminal Appeals of Alabama affirming the Circuit Court's order is reported as follows:

State v. Leighton, 35th case, 586 So.2d 308, (Ala. Cr. App, 1991)

A copy of the unreported memorandum opinion issued with said order is submitted in Appendix "B" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing is not reported. A copy of the same is submitted in Appendix "B" hereto.

The order of the Supreme Court of Alabama quashing the writ of certiorari issued to review the above order and opinion is not reported.

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on May 29, 1992, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Alabama Courts believed that their decisions were mandated by the Double Jeopardy Clause of the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT V

> "No person shall... be subject for the same offense to be twice put in jeopardy of life or limb...."

"AMENDMENT XIV

"Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The Respondent was initially convicted under Ordinance 111 of the City of Centre, Alabama. A copy of the same is submitted in Appendix "D" hereto.

Said ordinance adopts the state law and, in the case of the Respondent's initial conviction, the state law was Section 13A-11-73, Code of Alabama, 1975. A copy of the same is submitted in Appendix "E" hereto.

The instant prosecution is being brought under Section 13A-11-72 (a), Code of Alabama, 1975. A copy of the same is submitted in Appendix "E" hereto.

STATEMENT OF THE CASE

The Respondent, Richard Cole Leighton, was indicted for possession of a pistol after conviction for a crime of violence[1], namely murder in the second degree[2], by the Grand Jury of Cherokee

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1. §13A-11-72. CERTAIN PERSONS FORBIDDEN TO POSSESS PISTOL.

"(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence shall own a pistol or have one in his possession or under his control....." (Code of Alabama, 1975; Appendix "E")

2. "§13A-11-70. DEFINITIONS.

"For the purpose of this division, the following terms shall have the respective meanings ascribed by this section:

"(1) PISTOL. Any firearm with a barrel less than 12 inches in length.

"(2) CRIME OF VIOLENCE. Any of the following crimes or an attempt to commit any of them, namely, murder, manslaughter, (except manslaughter arising out of the operation of a vehicle), rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping and larceny...." (Ibid; emphasis supplied.)

County, Alabama, at the Grand Jury's October, 1990, Term. (R.pp. 5-6)

The indictment reads:

> "The Grand Jury of said County charges that before the finding of this indictment RICHARD COLE LEIGHTON, whose name to the Grand Jury is otherwise unknown than as stated, after having been convicted of the offense of Murder, Second Degree, in the State of California, did have in his possession or under his control a pistol, to-wit: one Colt 45 pistol, in violation of Section 13A-11-72(a) of the Code of Alabama, contrary to law and against the peace and dignity of the State of Alabama." (R.p.5)

On October 11, 1990, the Respondent was advised that he had been indicted and told to appear in court on October 19, 1990, for arraignment. (R.p.7)

On October 19, 1990, the Respondent, attended by counsel, Honorable Gary Davis, was arraigned on the indictment and pleaded not guilty. (R.p.71)

Twenty-seven (27) days later, on November 15, 1990, a motion to dismiss based on an alleged claim of former jeopardy was filed by the Respondent. According to the motion, the Respondent had been charged on September 18, 1990, with possession of a pistol without a permit or license,[3] in the Municipal Court of

---

[3] "...Section 1. Any person or corporation committing an offense within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the City of Centre, Alabama...."
(Ordinance No. 111, City of Centre, Alabama; Appendix "D")

"§ 13A-11-73. License to carry pistol in vehicle or concealed on person -- Required.

"No person shall carry a pistol in any vehicle or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefore as hereinafter provided."(Code of Alabama, 1975; Appendix "E")

Centre, Alabama. The motion claimed that on October 15, 1990, i.e. four (4) days after receiving notice of his having been indicted and four (4) days before his arraignment, the Respondent had pleaded guilty to such charge in the Municipal Court. On the basis of the resulting conviction, the Respondent claimed that the instant charges constituted double jeopardy. (R.pp. 29-30)

On November 26, 1990, the Honorable Trial Judge, so far as the record shows, without hearing evidence, dismissed the indictment on the alleged authority of Grady v. Corbin (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]). (R.pp. 32-33; Appendix "A")

Appeal by the Petitioner-State followed. (R.p. 67-69)

[The following is submitted solely for the information of the Court: On

appeal, a controversy arose as to whether the Trial Judge heard evidence without the presence of a court reporter, as contended by the Respondent, or heard no evidence, as contended by the Petitioner State. Although the Petitioner State filed appropriate motions under the Alabama rules of appellate procedure in the Trial Court and the Court of Criminal Appeals and raised the point in the Alabama Supreme Court, the state courts declined to resolve the controversey. As a result, there is no transcript of evidence in the record. Although the Respondent contends that the Trial Judge heard evidence, he has never suggested what the evidence was or what facts were shown.]

On June 14, 1991, the Court of Criminal Appeals of Alabama affirmed the Trial Court's judgement with an unreported memorandum opinion, relying on Grady v.

Corbin, above. (Appendix "B")

The Court ruled that a conviction for possession of a pistol without a permit or license bars a subsequent prosecution for possession of a pistol after conviction for a crime of violence, notwithstanding the fact that the State could prove the latter charge without reference to any lack of a license. (Appendix "B")

On June 21, 1991, the Petitioner State applied for rehearing in the Court of Appeals and moved for the finding of additional facts.

On August 23, 1991, the Court of Appeals overruled the Petitioner State's application without opinion. (Appendix "B")

The Petitioner State sought review of the Court of Criminal Appeals' decision and opinion by petition for a writ of certiorari, in The Alabama Supreme Court, raising the double jeopardy issue raised by

the instant petition.

On December 2, 1991, the Alabama Supreme Court granted the writ. However, on May 29, 1992, the Supreme Court quashed the writ, without opinion. (Appendix "C")

STATEMENT OF THE FACTS

As explained in our statement of the case, at pages 9-10, above, there is no indication in the record as to what, if any, evidence was heard by the Trial Court. The state appellate courts treated the issue here presented as one of the law.

However, the Petitioner-State proceeded in the state appellate courts with the assumption that the possession of a pistol without a license charge and the instant charge of possession of a pistol after conviction for a crime of violence arose out of the same act.

SUMMARY OF THE ARGUMENT

This case is one of many in which the lower courts have interpreted Grady v. Corbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct 2084 [1990]), as representing an abandonment of the principles announced in Blockburger v. United States (284 U.S. 299, 76 L.Ed 306, 52 S.Ct. 180 [1932]) and followed ever since. This case, therefore, presents a good opportunity to correct this misunderstanding.

Under the Blockburger Rule, the Respondent obviously has no claim of former jeopardy, but the Alabama Courts decided this case under Grady v. Corbin.

In Grady v. Corbin, this Court recognized that while an offense may not be included in another offense as the two are defined by statute, where an indictment for the greater offense alleges a lesser offense as the means of committing the

greater offense, the lesser offense is included in the greater offense, as charged in the indictment. The rule of Grady v. Corbin would have no application to an indictment like the one in the instant case, which alleges no crime, except that which it charges.

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT.

We would like to tell the Court that this case presents a new issue which has never before arisen, but we cannot. This case presents an issue decided sixty years ago, a decision which has been re-affirmed only this year. We would like to tell the Court that this case presents a complex issue of the application of a well established rule, but it does not. The facts, of this case are simple and the rule was obviously misapplied. This case is, however, one of many in which the lower courts have adopted the view that Grady v. Corbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]), represents a sharp departure from this Honorable Court's traditional teachings on double jeopardy. At least two such cases have already

burdened this Honorable Court. United States v. Felix 503 U.S. __, 118 L.Ed.2d 25, 112 S.Ct. 1377 (1992); United States v. Dixon, No. 91-1231, cert grant. April 27, 1992, 60 U.S. L.Wk. 3735. This case provides the Court with an opportunity to clarify Grady, so as to guarantee the proper application of the rule of that case to appropriate cases, while preventing needless litigation of the rule in other cases.

For sixty years the decision in Blockburger v. United States (284 U.S. 299, 76 L.Ed 306, 52 S.Ct. 180 [1932]), has provided the infallible test for the jeopardy effect of former prosecutions, which are factually or legally related to the instant prosecution. As applied to the situation presented by this case, where one act violates two statutes, the Blockburger Rule provides:

> "...A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other...." (284 U.S. 299, 304, 76 L.Ed 306, 309)

The most striking example of the application of this rule is in the situation where a person conspires to commit a crime and commits the crime. The Court has consistently held that such a person may be separately prosecuted and punished for the conspiracy and the crime. This is because, each offense requires proof of an act which the other does not. An agreement is required for conspiracy but not for the consumated crime; consumation is required for the crime, but not for conspiracy. See Pinkerton v. United States 328 U.S. 640, 643, 90 L.Ed 1489, 1494, 66 S.ct. 1180 (1946); United States v. Bayer

331 U.S. 532, 542, 91 L.Ed. 1654, 1661, 67 S.Ct 1394 (1947); Iannelli v. United States 420 U.S. 770, 777-779, 43 L.Ed.2d 616, 622-623, 95 S.Ct 1284 (1975), and Garrett v. United States, 471 U.S. 773, 778, 85 L.Ed.2d 764, 771, 105 S.Ct. 2407 (1985), all cited with approval for this proposition in United States v. Felix 503 U.S. __, 118 L.Ed.2d 25, 36, 112 S.Ct. 1377, 1384 (1992).

Alabama follows the Blockburger Rule. Clift v. State, 352 So.2d 838, 839 (Ala, 1977); cert. den, 435 U.S. 909, 55 L.Ed.2d 500, 98 S.Ct. 1459; Ex parte Wright, 477 So.2d 492, 493ff (Ala, 1985); McKinney v. State, 511 So.2d 220 224ff (Ala, 1987); Ex parte Coleman 584 So.2d 455, 457 (Ala, 1991).

Under Blockburger, the instant case is simple. To prove the violation of the city ordinance (Appendix "D"), the

prosecution would have had to prove that the Respondent carried a pistol concealed on his person or in a vehicle, without a license. Section 13A-11-73, Code of Alabama, 1975, Appendix "E". The prosecution would not have been required to prove a prior conviction. To prove the instant charge the prosecution will have to prove that the Respondent possessed or had under his control a pistol, after having been convicted of murder. Section 13A-11-72, Code of Alabama, 1975; Appendix "E". The prosecution would not be required to prove where or how the pistol was possessed nor the lack of a license. Obviously, each charge requires proof of at least one fact which the other does not. Under Blockburger a conviction or acquittal of one charge would not be jeopardy as to the other. However, the Alabama Courts did not decide this case under Blockburger, but

under Grady v. Carbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]), which they, like many courts, understood to be a sharp departure from Blockburger.

In Grady v. Corbin, this Honorable Court wrote:

> "...[A]subsequent prosecution must do more than merely survive the Blockburger test. As we suggested in [Illinois v.] Vitale [447 U.S. 410 (1980)], the double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted...." (495 U.S. 508, 521, 109 L.Ed.2d 548, 564)

The Alabama Courts, like many others, read this language to mean that, if to prove the present charge, the prosecution would have to prove an act which was proven in the prior prosecution, then the present prosecution is barred, if such act is unlawful. Such would, of course, always be

the case where the prosecutions are based on the same act. The first prosecution was brought, because the act is unlawful for one reason; the present prosecution is brought because the same act is unlawful for a different reason. Thus, this interpretation of Grady v. Corbin abolishes the rule of Blockburger which allows multiple prosecutions for the same act, if each prosecution requires proof of a fact, which the other does not.

We submit that this is not the correct interpertation of Grady. This approach is simply a variation of the "same evidence rule" which was expressly rejected in Grady. The passage we quote from Grady, above, continues as follows:

> "...This is not an actual evidence or same evidence test... The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the

> presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See Dowling v. United States, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990)...." (495 U.S. 508, 522, 109 L.Ed.2d 548, 564-565)

This was re-affirmed in United States v. Felix 503 U.S. , 118 L.Ed.2d 25, 34, 112 S.Ct. 1377, 1382 (1992) The proper understanding of Grady requires that it be read in its historical context.

The line of development from Blockburger to Grady passes through Brown v. Ohio (432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 [1977]) and Harris v. Oklahoma, (433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 [1977]). Brown and Harris applied the Blockburger rule to lesser offenses included in another offense, where charges based on one have been reduced to judgement and it is proposed prosecute the party for the other. The greater offense would, of

course, require proof of facts which need not be proven to sustain the lesser offense, but proof of the lesser would require proof of nothing not required for the greater. Therefore, the simple application of Blockburger compelled the conclusion that the subsequent prosecution was barred.

Since carrying of a pistol without a license is not in any sense a lesser offense included in possession of a pistol after conviction for a crime of violence, the rule Brown and Harris does not bar the instant prosecution.

The immediate progenitor of Grady v. Corbin, above, was Illinois v. Vitale (447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 [1980]). Both Vitale and Grady involved homicide charges[4] in which the means of the killing, as set out in the information in Vitale and the indictment and bill of particulars in Grady, included separate offenses for which the defendants had already been convicted. In Grady the Court recognized that such separate offenses were included in the homicide charge, because of the averments of the bill of particulars. In other words, while an offense may not be included in a crime as it is defined by

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4 Grady also involved an assault charge, but the difference between homicide and assault are not revelent to this discussion.

statute, it may be included in an offense as charged in a particular indictment. Much of the confusion attributed to Grady arises from efforts to read Grady as a total departure from Blockburger, while Grady, in fact, simply applied the rule of Blockburger to offenses as charged rather than limiting its application to offenses as defined by statute. That this is the correct interpretation of Grady, is demonstrated by the following language from Grady:

> "...The rest of our inquiry in this case is simplified by the bill of particulars filed by the State on January 25, 1988...That statement of the prosecution's theory of proof is binding on the State until amended...[citation omitted.] and the State has not amended it to date...[citation omitted.] The bill of particulars states that the prosecution will prove the following: [Quotation of the bill of particulars omitted.]
>
> "By its own pleadings, the

State has admitted that it will prove the entirety of the conduct[5] for which Corbin was convicted--driving while intoxicated and failing to keep right of the median--to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court of Appeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence). (Grady v. Corbin 495 U.S. 508, 523, 109 L.Ed.2d 548, 565-566; emphasis supplied.)

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5 We submit that the Court used "conduct" in the Grady opinion to emphasize that the limitations imposed by the Double Jeopardy Clause cannot be evaded by using different words to describe the same offense.

In other words, if the charges were amended to delete the references to the offenses represented by the prior convictions, Corbin's claim of former Jeopardy would evaporate. The homicide charge would not be barred, even through the prosecution would have to prove that Corbin drove a motor vehicle and not withstanding the fact that such driving was coincidently illegal due to Corbin's state of intoxication and the fact that the driving was in the wrong lane.

We submit that the analysis of Grady v. Corbin, which we present in the previous paragraph is consistent with the whole Blockburger line of cases, from Blockburger itself to United states v. Felix (503 U.S. __, 118 L.Ed.2d 25, 112 S.Ct. 1377 [1992]). We submit that the writ should issue in this case to clarify the opinion in Grady, under the analysis we suggest.

Applying the foregoing analysis to the instant case, it is obvious that the Alabama Courts misapplied the Rule of Grady v. Corbin. For Grady to apply, the indictment must aver the offense represented by the prior conviction. Thus, if the instant indictment made reference to carrying a concealed pistol without a license or otherwise described such conduct, the Grady Rule would have barred the prosecution, until such reference was deleted and replaced with the word "possessed". But, the indictment in this case (R.p. 5), makes no reference to any offense other than that charged. Proving the averment of possession of a pistol would not require or even justify proof of all of the elements of the prior charge, e.g. the Respondent's lack of a license. In the words of Grady v. Corbin, the State Of Alabama will not, "...prove the entirely of

the conduct for which....", the Respondent has already been convicted. See the language quoted at page 27, above. In applying the Rule of Grady v. Corbin to this case, the Alabama Courts erred.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, ruled contrary to the decisions of this Honorable Court in every case addressing the issue here raised since 1932, including Grady v. Corbin (495 U.S. 508 [1990]) the decision they relied on as authority. In addition, this case provides an opportunity to clarify misunderstandings and misinterpretations of Grady v. Corbin, which are now burdening the courts.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

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BY:

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0570D

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APPENDIX TO THE PETITION

OF

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APPENDIX A

ORDER AND FINDINGS OF THE CIRCUIT COURT

OF CHEROKEE COUNTY, ALABAMA

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ORDER

The Defendant has moved the Court to dismiss the indictment in this case under the authority of Grady v. Corbin, 109 L.Ed.2d, 548 (199), which holds that the Double Jeopardy Clause of the United States Constitution bars a subsequent prosecution, if, to establish an essential element of the offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the Defendant has already been prosecuted. In the instant case, the Defendant is charged with the offense of Possession of a Firearm after conviction of a felony. The Defendant contends that this prosecution is barred because he was tried and convicted in the City Court of Centre, Alabama, for Possession of a Firearm Without a Permit.

Under Corbin, supra., the conduct which constitutes an offense in the first prosecution, must be embraced within the subsequent prosecution before the first case constitutes a bar to the second.

The State contends that possession of a firearm above is not criminal conduct and that, therefore the possession of the firearm is not "conduct that constitutes an offense" for which the Defendant has already been prosecuted.

This Court finds, however, that because the Defendant had been previously convicted of a felony he was not eligible to obtain a permit. Therefore, possession of a firearm alone is a criminal act for one who has been preciously convicted. Consequently, Possession of a Firearm constitutes a criminal offense, and in this case it is a criminal offense for which the Defendant has already been prosecuted.

This Court is of the opinion that the instant case is barred under the Double Jeopardy Clause of the United States Constitution, and, accordingly, it is,

ORDERED that this case shall be, and is hereby dismissed under the authority of Grady v. Corbin, 109 L.Ed.2d 548 (1990).

DONE this 26 day of November, 1990.

/s/ DAVID A. RAINS
DAVID A. RAINS, CIRCUIT JUDGE

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APPENDIX B

[RELEASED: June 14, 1991]

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

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MONTGOMERY 36130

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H. WARD MCMILLAN

Judges

CR-90-328 Cherokee Circuit Court CC-90-158

State v. Richard Cole Leighton

AFFIRMED BY MEMORANDUM.

The argument of the appellant that the trial court erred in dismissing the

indictment because the appellee failed to raise the defense of double jeopardy at arraignment is without merit. The trial court had the discretion under Rule 16.3(b), A.R.Cr.P. (Temp.), to extend the time for the filing of the appellee's defense motion and was not required to set out its reasons for so doing. The court also had the discretion under Rule 16.2 to grant the appellee relief from waiver due to the delayed filing.

The argument of the appellant that the trial court erred in dismissing the indictment for possession of a pistol after a crime of violence because it was not barred by the appellee's previous conviction of possession of a pistol without a permit is without merit. The appellee is a convicted murdered who cannot legally obtain a pistol permit and for

whom, therefore, the mere possession of a pistol constitutes both crimes. Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) prohibits a subsequent prosecution if to establish an essential element, the prosecutors will prove conduct that constituted a previoulsy prosecuted offense.

ALL THE JUDGES CONCUR

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 90-328
(Cherokee Circuit Court No. 90-158)

State of Alabama vs. Richard Cole Leighton
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on August 23, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

/s/LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:kl

Hon. A. Richard Igou
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APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
May 29, 1991

19001818

Ex parte State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: State v. Richard Cole Leighton)

(CCA 90-328 (Cherokee CC-90-158)

CERTIFICATE OF JUDGMENT

WHEREAS, On December 2, 1991, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREAS, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, denied. NO COSTS TAXED. NO OPINION.

ADAMS, J. - Hornsby, CJ., Almon, Steagall and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 29th day of May, 1992.

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

ORDINANCE OF CENTRE

ORDINANCE NO. 111

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CENTRE, ALABAMA AS FOLLOWS:

Section 1. Any person or corporation committing an offense within the corporate limits of the City of Centre, ALabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the City of Centre, Alabama.

Section 2. Any person or corporation committing an offense within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a violation, shall be guilty of an offense against the City of Centre, Alabama.

Section 3. Any person or corporation committing within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, an offense as defined by Section 13A-1-2 of the Alabama Criminal Code, which offense is not declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a felony, misdemeanor or

violation, shall be guilty of an offense against the City of Centre, Alabama.

Section 4. Any person found to be in violation of Sections One (1), Two (2) or Three (3) of this ordinance shall, upon conviction, be punished by a fine of not less than One Dollar ($1.00) nor more than Five Hundred Dollars ($500.00) and/or may be imprisoned or sentenced to hard labor for the city for a period not exceeding six (6) months, at the discretion of the Court trying the case, unless otherwise provided by Section 5 of this ordinance. Any corporation found to be in violation of Sections One (1), Two (2) or Three (3) of this ordinance shall, upon conviction, be punished by a fine of not less than One Dollar ($1.00 nor more than Five Hundred Dollars ($500.00), at the discretion of the

Court trying the case.

Section 5. Any person found to be in violation of Section 32-5A-191, Code of Alabama, 1975, as amended, shall, upon conviction, be punished by a fine of not more than Five Thousand Dollars ($5,000.00) and/or may be imprisoned or sentenced to hard labor for not more than one year.

Section 6. Any ordinance heretofore adopted by the City Council of the City of Centre, Alabama, which is in conflict with this ordinance is hereby repealed to the extent of such conflict.

Section 7. If any part, section or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of

this ordinance, which shall continue in full force and effect notwithstanding such holding.

Section 8. This ordinance shall become effective on

August 10, 1983.

ADOPTED AND APPROVED THIS THE 9th DAY of August, 1983.

ATTEST: /s/ ED YARBROUGH
ED YARBROUGH, MAYOR

/s/ JERRY D. O'NEAL
JERRY D. O'NEAL, CITY CLERK

APPENDIX E

RELEVANT ALABAMA STATUTES

Code of Alabama, 1975:

TITLE 13A, §13A-11-70. DEFINITIONS.

For the purpose of this division, the following terms shall have the respective meanings ascribed by this section:

(1) PISTOL. Any firearm with a barrell less that 12 inches in length.

(2) CRIME OF VIOLENCE. Any of the following crimes or an attempt to commit any of them, namely, murder, manslaughter, (except manslaughter arising out of the operation of a vehicle), rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping and larceny.

(3) PERSON. Such term includes any firm partnership, association or corporation.

§13A-11-72. CERTAIN PERSONS FORBIDDEN TO POSSESS PISTOL.

(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence shall own a pistol or have one in his possession or under his control.

(b) No person who is a drug addict or an habitual drunkard shall own a pistol or have one in his possession or under his control.

§13A-11-73. LICENSE TO CARRY A PISTOL IN VEHICLE OR CONCEALED ON PERSON -- REQUIRED.

No person shall carry a pistol in any vehicle or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefor as hereinafter provided.

0564D

Supreme Court, U.S.
FILED
NOV 3 1992
OFFICE OF THE CLERK

No. 92-335

In The

Supreme Court of the United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

vs.

RICHARD COLE LEIGHTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court And Court Of Criminal Appeals Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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No. 92-335

In The

Supreme Court of the United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

vs.

RICHARD COLE LEIGHTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court And Court Of Criminal Appeals Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 15, 1990, the respondent, Richard Cole Leighton, was convicted in the Municipal Court of the City of Centre, Alabama, of the offense of possession of a pistol without a permit. On October 9, 1990, some six (6) days prior to the entry of the plea in the Municipal Court of the City of Centre, Alabama, respondent was indicted by the Circuit Court of Cherokee County, Alabama, for the offense of possession of a firearm by a convicted felon.

SUMMARY OF ARGUMENT

Both cases arise out of the same set of facts as conceded by the petitioner, State of Alabama, in its brief filed with this Court. This Court has held that the Double Jeopardy Clause bars a subsequent prosecution if to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which a defendant has already been prosecuted. In the case at bar, respondent was convicted in the Municipal Court of the City of Centre, Alabama, of the offense which incorporates Section 13A-11-73 of the *Code of Alabama* (see appendix E of petitioner). Subsequent thereto, respondent was indicted by the Circuit Court of Cherokee County, Alabama, for the violation of Section 13A-11-72 of the *Code of Alabama* which charges a felony for the possession of a pistol by one who has been convicted for committing or attempting to commit a crime of violence (see appendix A of petitioner). The Cherokee County Circuit Court has ruled and the Court of Criminal Appeals for the State of Alabama has affirmed on the basis that because the respondent had been previously convicted of a felony, he was not eligible to obtain a permit. Therefore, possession of a firearm alone is a criminal act for one who has been previously convicted. Consequently, possession of a firearm constitutes a criminal offense and, in this case, it is a criminal offense for which respondent has already been prosecuted.

The Court of Criminal Appeals for the State of Alabama put it thusly:

> "The [respondent] is a convicted murderer who cannot legally obtain a pistol permit and for whom, therefore, the mere possession of a pistol constitutes both crimes."

Therefore, the petitioner in this case would ask the Court to ignore its ruling in *Grady v. Corbin* wherein this Court held that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2nd 548 (1990). Rather, the petitioner would have the Court do what it refused to do in *Grady v. Corbin*, and that is to return to the *Blockburger* test as the only test to be used in determining whether the Double Jeopardy Clause of the United States Constitution applies or does not apply [see *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 52 S. Ct. 180 (1932)]. The petitioner is attempting, by the vehicle of this case, to have the Court not just to clarify *Grady v. Corbin* as is stated in its brief, but it is actually a request to overrule *Grady v. Corbin*. Because of the facts as stated by the Cherokee County Circuit Court and by the Court of Criminal Appeals for the State of Alabama, we must all accept that the respondent is not one who could not legally obtain a pistol permit. That being the fact, the mere possession of a pistol, under whatever statute he might be sought to be prosecuted, would constitute a part of any other offense that also sought to prosecute him for possession of that same pistol on the same occasion. In this instance, it is quite clear that the operative fact in both prosecutions is the "possession" of the pistol. There

are no facts that could be presented in the Municipal Court different from those in the Circuit Court that would change the fact of the possession of the pistol which is "the offense" for which the respondent is guilty, whether prosecuted in the municipal ordinance or under the indictment in the present cause.

The questions asked at the onset of petitioner's brief represent the muddlement and confusion of the petitioner in attempting to present the question to the Court without asking the Court, in a backhanded way, to reverse the *Blockburger* decision. The petitioner asks, "Does this Court's decision and opinion in *Grady v. Corbin*, 495 U.S. 508 (1990), represent an abandonment of the principles announced in *Blockburger v. United States*, 284 U.S. 299 (1932), relating to multiple prosecutions each based in part on the same act?" The Court very clearly states in the *Grady* opinion that the *Blockburger* test, in fact, has not been abandoned and is the first test that is used. Then, in its opinion, this Court stated that the *Blockburger* test is not the last step of inquiry, but in fact, holds that the Double Jeopardy Clause bars a subsequent prosecution of an offense if to establish an essential element of an offense charged in that subsequent prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This goes a step beyond *Blockburger* and, in fact, is the step that the petitioner refuses to accept in the case at bar. The Circuit Court of Cherokee County, Alabama, and the Court of Criminal Appeals for the State of Alabama find, as a factual and legal matter, that the respondent has already been convicted of the conduct which the government will prove constitutes an offense

for which the defendant has already been prosecuted, i.e. possession of the pistol.

The petitioner's question number two (2) might be more clearly answered by saying that where a party by a single act commits two (2) offenses, "A" and "B", and is convicted of offense "A" and, in order to obtain a conviction of offense "B" of necessity proves "A", then the prosecution of "B" has been forestalled by the conviction of offense "A". The holding in *Grady* demands such a result because "a strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause." *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2nd 548 (1990).

It has been held in previous cases that the *Blockburger* test is not the exclusive test. The petitioner would have this Court hold that *Blockburger* is the exclusive test, go back to the year 1932 and ignore all subsequent law following 1932. *Brown v. Ohio*, 432 U.S. 166, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). *Harris v. Oklahoma*, 433 U.S. 682, 53 L. Ed. 2d 1055, 97 S. Ct. 2912 (1977). *North Carolina v. Peace*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969).

CONCLUSION

The petition for writ of certiorari should be denied unless this Court is willing to reverse the holding in *Grady v. Corbin* and adopt the *Blockburger* test as the final and only test to be applied on a Double Jeopardy Case.

Respectfully submitted,

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